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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No.

EPHRAIM FREIGHTWAYS, INC., Petitioner,

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 17, 1967.

CITATIONS TO OPINIONS BELOW

The opinion and order of the District Court (R. 85) is unreported and is printed in the Appendix hereto, *infra*, p. 15. The opinion and order of the Court of Appeals is reported in 376 F.2d 40 and is printed in the Appendix hereto, *infra*, p. 16.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1967. Ct. App. R. 4; Appendix, *infra*, p. 16. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The District Court denied defendant's motion to stay all further proceedings below. The purpose of the stay was to defer the action until final determination of an administrative proceeding before the Public Utilities Commission of the State of Colorado in which defendant has intervened because the basic issues before both the Commission and the District Court are contended to be the same. Both injunctive relief and damages are sought by plaintiff below. The question presented is:

> Is the denial of the stay appealable as an interlocutory order refusing an injunction?

STATUTE INVOLVED

The Statute involved is 28 U.S.C., § 1292 (a) (1). It permits appeals to the courts of appeal from interlocutory orders of the district courts refusing injunctions. The statute is set out in the Appendix, *infra*, p. 12.

STATEMENT OF THE CASE

Plaintiff, Red Ball Motor Freight, Inc., brought action against defendant, Ephraim Freightways, Inc., for both an injunction and for damages. The District Court below acquired jurisdiction under 28 U.S.C. § 1332. (R. 77, 86) The complaint is based upon governing Colorado law. (R. 1, 87) Plaintiff is a common carrier of property by motor vehicle, holding a certificate of public convenience and necessity from the Public Utilities Commission of the State of Colorado. (R. 1, 87, 89) Defendant is a private (contract) carrier of property by motor vehicle holding a permit from the Public Utilities Commission of the State

of Colorado. (R. 6, 87, 89) Plaintiff's contention is that defendant has unlawfully operated as a common carrier of property in competition with plaintiff. (R. 1, 87) Defendant denies that it has engaged in unlawful operations either as a common carrier or as a private carrier. (R. 43, 88)

Various preliminary motions were filed by plaintiff and defendant. (R. 16, 17, 18, 19, 20, 25, 30, 32, 82) Orders of the court were entered accordingly. (R. 36, 38, 39, 85) Certain pre-trial discovery proceedings were conducted by plaintiff. (See R. 14, 25, 34 and other entries, appearing on certified copy of docket entries, dated 9-22-65, 10-4-65, 1-18-66, 4-13-66, 5-5-66 at Ct. App. R. 1B). Motions for intervention were filed by Contract Carriers' Conference of Colorado Motor Carriers Association and others (R. 50, 55) and by Miller Brothers, Inc. (R. 60, 63) Both said motions to intervene were denied. (R. 71) The court has now entered an amended pre-trial order. (R. 86)

After the denials of the motions to intervene and before the entry of the pre-trial order, defendant filed its motion to stay all proceedings in the within matter. (R. 74-A) Defendant requested the stay until final determination of a complaint case pending before the Public Utilities Commission of the State of Colorado, entitled *Denver Laramie Walden Truck Line, Inc., et al. vs. Miller Brothers, Inc.*, being docketed as Case No. 5314 (hereinafter referred to as *"Miller"*). (A copy of the formal complaint before the Commission is attached as Exhibit "A" to defendant's motion to stay. R. 74-D.) Said motion set forth (1) the issues contained in *Miller* which are deemed pertinent herein; (2) the commission staff's statement that the *Miller* issues are "extraordinarily significant"; (3) that the determination of those issues will be binding upon your petitioner as well as all other class A private carriers; (4) that the Public Utilities Commission, in *Miller*, will determine many of the issues involved in the instant case; and (5) that a conflict between a determination by the federal courts and by the Public Utilities Commission of the State of Colorado would place this carrier in an untenable posi-

tion of having two complete and separate rules that cannot be reconciled but must be followed. The motion was denied. (R. 83)

Appeal was duly prosecuted from the order of the District Court for the District of Colorado to the Court of Appeals for the Tenth Circuit in accordance with 28 U.S.C. § 1292(a). The opinion of the Court of Appeals was that the order of the District Court denying the stay was appealable as a denial of an interlocutory injunction only if the action in which the order was made is essentially an action at law and if the stay was sought to permit the prior determination of some related equitable matter. This action, the court held, is essentially equitable in nature even though in order to obtain complete relief an award of damages is also sought. The court further held that defendant sought the stay not to permit the prior determination of a related equitable matter, such as a defense or counterclaim, but rather for the purpose of deferring the action until the determination of an administrative proceeding before the Public Utilities Commission for the State of Colorado. Such an administrative proceeding, the court stated, is not a related equitable matter. Therefore the appeal was dismissed. Appendix, *infra*, p. 16.

REASONS FOR GRANTING THE WRIT

1. The statute makes appealable all "interlocutory orders . . . refusing . . . injunctions . . ." 28 U.S.C., § 1292(a). But is a stay order to be considered as an interlocutory injunction order? Mr. Justice Black with whom Mr. Justice Douglas concurred, has answered affirmatively, stating:

> "And this Court has held that § 1292 makes all stay orders appealable that have the substantial effect of interlocutory injunction orders. Ettelson vs. Metropolitan Life Insurance Co., 317 U.S. 188, 63 S. Ct. 163, 87 L.Ed. 176." *Baltimore Contractors, Inc. vs. Bodinger*, 348 U.S. 176, 181 (1955). (Dissenting opinion.)

The question next is whether the stay order has the

"substantial effect" of an interlocutory injunction order. This Court stated in simple terms long ago in *Shanferoke Coal & Supply Corporation vs. Westchester Service Corporation,* 293 U.S. 449, 55 S.Ct. 313 (1934) that the principle that makes the interlocutory order in this case an appealable refusal of an injunction is:

> "(T)he motion for a stay is an application for an interlocutory injunction. . . ."

The decision below conflicts with the broad liberal policy of that statute on its face and with the construction of that statute by this Court.

There is of course a recognized distinction between cases in which a stay is sought which amounts to an interlocutory injunction and cases in which a stay is sought to control the progress of the cause so as to maintain the orderly processes of justice. The court below had an apparently reasonable basis for ruling as it did based on certain language in the cases of *City of Morgantown vs. Royal Insurance Co., Ltd.,* 337 U.S. 254 (1949) and *Baltimore Contractors, Inc. vs. Bodinger,* 348 U.S. 176 (1955). However, the holdings, as distinguished from the opinions, in the *Morgantown* and *Bodinger* cases can be reconciled with the broad limits of the statute as originally construed by the *Shanferoke* case. The actual holdings in the *Morgantown* and *Bodinger* cases were that these cases were simply applications for stays to control the progress of the cause so as to maintain the orderly processes of justice and were not applications for "injunctions."

But we have not a matter of determining mere mode and sequence of trial here. This is not a case where a stay is sought in order that a jury trial may be held first or last as in *Morgantown.* Rather the order appealed from falls on the other side of the line and constitutes an injunction contemplated by the statute permitting an appeal.

It would appear that this case presents this Court with the opportunity to set forth once and for all the distinction between the cases cited above and to reconcile them

with the principle underlying all of them permitting appeals in proper cases under the statute.

2. Even if the opinions in the *Morgantown* and *Bodinger* cases, apart from the holdings in those cases, be considered, the fact situation in the case before this Court complies with the requirements of those opinions. Under the rule of those cases, the denial of defendant's motion for a stay is appealable only if the action is by its nature an action at law.

In order to determine whether a matter is essentially an action at law or whether it is essentially a suit in equity, the Court must determine what the gist of the action is. Where the action is essentially for money damages, which in common law would fall in a well recognized form of action such as an action of tort for damage to property or person, the case is an action at law even though there has been added an incidental prayer for equitable relief. In the instant action, the fact that over $350,000 has been demanded as damages, for depriving plaintiff of business, damage to its goodwill and franchise, and for penalty damages, it would appear that a substantial claim for damages had been made and that the matter is essentially an action at law. The fact that plaintiff also seeks an injunction to prevent further injury to it, is simply incidental to the action and does not make it an equitable action but rather it remains as an action at law. The within matter is at least an action at law coupled with an action in equity, and therefore is appealable.

3. It would appear that the court below is in error in determining that the stay order is only appealable if the purpose of the stay is to permit the prior determination of a related equitable matter. There is no such requirement appearing in the statute or the *Shanferoke* case. This element has never been stated by this Court to be necessary to an appeal under § 1292(a).

In principle, there would seem to be no good reason to require this additional road block to an appeal. A stay

order should be appealable where the prior determination of *any* related matter is sought whether equitable or otherwise. In this case there was and is a related matter pending before the Public Utilities Commission of the State of Colorado in which this defendant has intervened. It involves the same basic issues as are before the federal district court. We submit that the removal of this unnecessary road block against appeals would place the granting of appeals on a sound basis for this appellant and for others. Certainly Congress had good reasons for enacting the statute permitting interlocutory appeals. This purpose is being frustrated by the courts of appeal in their interposing as a requirement for appeals that the purpose of the stay order sought must be to permit the prior determination of a related *equitable* matter. E.g. *Jackson Brewing Co. vs. Clarke,* 303 F.2d 844 (5th Cir. 1962), cert. denied 371 U.S. 891; *Allied Air Freight, Inc. vs. Pan American World Airways, Inc.* 340 F.2d 160 (2d Cir. 1965), cert. denied 381 U.S. 924.

4. The sound and very pertinent remarks of Mr. Justice Black in his dissent in the *Bodinger* case are equally applicable here, and demonstrate the sound reasons for ruling that this is an appealable case:

> *"For two trials, one unnecessary, may take longer and cost more than two appeals where one would do.* Take this case for example. It must now go back for a court accounting trial which could be time-consuming and expensive to litigants and to the Government. And should petitioner lose on the merits it could undoubtedly appeal. On that review the first question for the appellate court would be whether the order denying arbitration, which the Court now refuses to consider, was right or wrong. If found wrong, the trial court's judgment on the merits would have to be vacated and the case again sent back for determination on the merits—this time by arbitration. In that event the trial the Court now orders will have been wholly futile — not even the litigant who now appears to be suc-

> cessful will have gained anything from it, unless perchance he stands to profit from delay. There is some difficulty, at least, in laying this wasteful procedure at the door of Congress." 348 U.S. at 186, 75 S.Ct. at 255. (Emphasis added.)

In line with Justice Black's reasoning, two trials in the within case, one unnecessary, may take longer and cost more than two appeals where one would do. If the dismissal of this appeal should stand, and this case is to be tried without reference to the *Miller* case now pending before the Public Utilities Commission of the State of Colorado and then after a trial — expensive and time-consuming to both the litigants and to the courts — upon subsequent appeal, if the court should find that this cause should have been stayed and that the *Miller* case should guide the court in the within matter, then a *retrial* of the within case after the conclusion of the *Miller* case would be the probable outcome. "In that event not even the litigant who now appears to be successful will have gained anything from it. . . ."

By refusing review, the court below has denied plaintiff the opportunity to have reviewed a question of grave importance to the people of the State of Colorado, and indeed to shippers and receivers of freight everywhere. Similar issues of similar concern are presented in the *Miller* case before the Public Utilities Commission of the State of Colorado. With reference to the latter case, the staff of the Public Utilities Commission entered its notice of participation and stated therein:

> "The issues contained in and basic to the above entitled action are extraordinarily significant to the regulation of motor carriers in the State of Colorado."

It is anticipated that the effect of the within matter, if plaintiff should prevail in its complaint for an injunction, or the effect of the *Miller* case if the complainants therein should prevail in obtaining an order revoking the authority of Miller Bros., would in either case, have a devastating

effect on the contract carriers within the State of Colorado. The common carrier plaintiff in the within matter seeks to enjoin the private carrier defendant herein from operation and would virtually put defendant out of business. The actions of the common carrier complainants in the *Miller* case against the contract carrier respondent therein seek to revoke the permit of *Miller*, and would thereby put that respondent out of business. But much more is at stake than Ephraim and Miller. The future of contract carriers throughout the state is in jeopardy, if either Ephraim or Miller should fall. The result will be the elimination of a majority of the services of the present class A private (contract) carriers by motor vehicle. This would eliminate approximately 50% of Colorado's intrastate for-hire motor freight system operating on regular schedules over regular routes. With many Colorado shippers and receivers of freight dependent very largely, and with others dependent wholly, upon motor freight transportation, the significance of this elimination is readily apparent and makes the matter before this Court one of grave importance.

Appellant believes that the basic issues of the *Miller* case are also inherent in the within case. Both cases must be decided in accordance with Colorado law. Orderly procedure would indicate that only one such matter should be determined at a time. The federal courts should not have to decide a case ahead of the state tribunal which is empowered to and which is about to determine the principles which will be controlling in this case.

The *Miller* case will be controlling because the pronouncement of the Public Utilities Commission is tantamount to and has the effect of a state statute unless and until it is set aside by the Colorado courts or legislature, and so is binding upon the federal courts. The law of Colorado can and should be interpreted by the Public Utilities Commission and the Colorado courts prior to determination by the federal courts. The Commission is much closer to the effect which this case or the *Miller* case will have upon the motor carriers industry within the state than are the

courts. Hence, the Commission should be allowed to exercise its judgment first, in order to prevent the courts from entering an order or orders which subsequently may prove to be a nullity. Thus the Court of Appeals should review the decision of the District Court refusing to stay proceedings before it until the *Miller* case can be decided.

The importance of the within matter is pointed up by the action of the Forty-sixth General Assembly of the State of Colorado which recently adjourned. That session enacted Senate Bill 208 (Appendix *infra* p. 12), which was the first major piece of legislation in a period of some thirty years concerning the motor carriers industry. It changed the philosophy of motor carriage for the transportation of freight from the principle of regulated monopoly to the principle of regulated competition.

This law was based largely upon the fact that the *Miller* case and the within case were before the Public Utilities Commission and the federal courts. The view of the legislature was that if private carriage is threatened then another system of carriage—namely additional common carriers—must be made available through the state so that the carriage of freight by motor vehicle may be uninterrupted and continued by competition among the carriers.

In addition, a joint resolution by the House and Senate of the Forty-sixth General Assembly, SJR 32 (Appendix, *infra* p. 13), set up a legislative study committee to study among other things the relationship between contract and common carriers by motor vehicle.

The concern of the legislature for this problem points up the significance of the case at hand.

A review of the stay order is sought so that orderly handling of the principles involved may take place; and because of the importance of this matter, the stay order should have been reviewed.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas F. Kilroy
Truman A. Stockton, Jr.
John H. Lewis
William F. Schenkein

Counsel for Petitioner

July 1967

APPENDIX

28 U.S.C. § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court....

FORTY-SIXTH GENERAL ASSEMBLY
SENATE BILL NO. 208

A BILL FOR AN ACT

RELATING TO REGULATED COMPETITION AMONG MOTOR VEHICLE CARRIERS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 115-9-5, Colorado Revised Statutes 1963, is amended to read:

115-9-5. *Rules for issuance.* (1) The commission shall have power, under such rules of procedure governing the application therefor as it may prescribe, to issue a certificate of public convenience and necessity to a motor vehicle carrier or to issue it for the partial exercise only of the privilege sought; and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

(2) The granting of any certificate of public convenience and necessity to operate a motor vehicle for hire, for the transportation of property, shall not be deemed to be

an exclusive grant or monoply, and the doctrine of regulated competition shall prevail. The commission shall have authority to grant more than one certificate of public convenience and necessity to operate motor vehicles for the transportation of property, over and along the same route or a part thereof or within the same territory or a part thereof, if the commission finds that the present or future public convenience and necessity requires or will require such operation.

SECTION 2. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health and safety.

Approved June 16, 1967

FORTY-SIXTH GENERAL ASSEMBLY
S.J.R. NO. 32

Be It Resolved by the Senate of the Forty-sixth General Assembly of the State of Colorado, the House of Representatives concurring herein:

1. That a committee composed of fifteen members be appointed for the conduct of a study herein set forth.

2. Five of the members of said committee shall be named by the Governor, and shall be leading businessmen selected from utilities and businesses which are regulated by the Public Utilities Commission of the State of Colorado. Such members shall represent as nearly as possible all utilities and businesses so regulated.

3. The remaining ten members of the committee shall be composed of five members from each house of the General Assembly, with three members from the majority party in each house, and two members from the minority party in each house.

4. *The committee shall conduct a study of the laws of the State of Colorado administered by and pertaining to the Public Utilities Commission of Colorado, the goals of which study shall be: To determine the adequacy of such laws; to consider the need for greater specificity in such laws; to recommend changes in such laws to improve the system of regulation and enforcement thereof;* to make recommendations concerning the method of selection and qualifications of members of the Public Utilities Commission.

5. *In making recommendations, the committee shall take into account the needs of the public; the industries regulated and the problems of each of them; and the necessity to treat reasonably those industries and segments thereof which have developed their conduct in reasonable reliance upon the laws as interpreted and administered by the commission.*

6. That the committee conduct its study during the year 1967, and report on the results thereof to the Second Regular Session of the Forty-sixth General Assembly.

7. That the staff of the Legislative Council shall assist the committee in its study, and all expenditures of the committee shall be approved by the chairmen of the Legislative Council, and be paid by vouchers and warrants drawn as provided by law from the appropriation made for interim studies of the Legislative Council; but no more than $2,000 shall be expended for such purposes.

8. That a copy of this resolution be transmitted to the Honorable John A. Love, Governor of the State of Colorado. (Emphasis added.)

Approved March 29, 1967

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 9332

RED BALL MOTOR FREIGHT, INC.,
a corporation,

Plaintiff,

vs.

EPHRAIM FREIGHTWAYS, INC.,
a corporation,

Defendant.

ORDER

The plaintiff is the holder of a certificate of public convenience and necessity issued by the Public Utilities Commission of the State of Colorado to operate as a common carrier by motor vehicle. The defendant operates as a private carrier by motor vehicle under a Class A permit issued by the Public Utilities Commission of the State of Colorado. In essence, the complaint alleges that the defendant is engaged in operations not permitted by its permit and which encroach upon the lawful operations of the plaintiff, and the plaintiff seeks damages and an injunction.

The defendant has moved to stay further proceedings in this matter because there is now pending before the Public Utilities Commission a proceeding between parties who are strangers to this action, but in which the defendant believes many of the questions before the court in the instant case will be determined by the Public Utilities Commission of the State of Colorado. The stay is opposed by the plaintiff.

The court is of the opinion that this is not a proper case to invoke the doctrine of abstention and that this matter should not be stayed.

IT IS THEREFORE ORDERED that the motion to stay be and the same is hereby denied.

DATED at Denver, Colorado, this 20th day of July, 1966.

BY THE COURT:

HATFIELD CHILSON

Hatfield Chilson, Judge
United States District Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 9068

EPHRAIM FREIGHTWAYS, INC.,

Appellant,

vs.

RED BALL MOTOR FREIGHT, INC.,

Appellee.

April 17, 1967

Stockton, Lewis and Mitchell, Denver, Colorado, (Truman A. Stockton, Jr., John H. Lewis and William F. Schenkein, Denver, Colorado on the brief), for Appellant.

Edward T. Lyons, Jr., of Jones, Meiklejohn, Kehl & Lyons, Denver, Colorado, (T. Peter Craven, Denver, Colorado, with him on the brief), for Appellee.

Before PICKETT, BREITENSTEIN and HICKEY, Circuit Judges.

PICKETT, Circuit Judge.

This is an appeal from an order of the United States District Court for the District of Colorado denying a motion to stay all proceedings pending determination by the Colorado Public Utilities Commission of another case said to be determinative herein.

Red Ball Motor Freight, Inc. brought a diversity action against Ephraim Freightways, Inc. for an injunction and damages. Red Ball is a common carrier by motor vehicle, holding a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission. Ephraim is a private (contract) carrier of property by motor vehicle under a permit issued by the Colorado Public Utilities Commission. Red Ball's complaint, based upon applicable Colorado law, alleges that Ephraim has unlawfully operated as a common carrier of property in competition with Red Ball. Ephraim denies that it has engaged in any unlawful operations, either as a common carrier or as a private carrier. Ephraim interposed a motion to stay all proceedings in the matter until final determination of a case pending before the Colorado Public Utilities Commission, and alleged that the resolution of the issues therein would be determinative in the present case. The motion was denied.

We are confronted with a preliminary question of appellate jurisdiction. It is apparent that the order denying the motion to stay is not a final decision under 28 U.S.C. §1291. Therefore, the order is appealable, if at all, only as an interlocutory order refusing an injunction under 28 U.S.C. §1292(a)(1), which permits appeals from "(i)nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." It has been made clear in a series of United States Supreme Court decisions that an order staying or refusing to stay proceedings in the United States

District Court is appealable as an interlocutory injunction only if the action in which the order was made is essentially an action at law and the stay was sought to permit the prior determination of some related equitable matter. Baltimore Contractors v. Bodinger, 348 U.S. 176; Morgantown v. Royal Ins. Co., 337 U.S. 254; Ettelson v. Metropolitan Ins. Co., 317 U.S. 188; Shanferoke Co. v. Westchester Co., 293 U.S. 449; Enelow v. New York Life Ins. Co., 293 U.S. 379. See also, Schine v. Schine, 2 Cir., 367 F.2d 685; Travel Consultants, Inc. v. Travel Management Corp., D.C. Cir., 367 F.2d 334; Jackson Brewing Co. v. Clarke, 5 Cir., 303 F.2d 844, cert. denied 371 U.S. 891. This action for injunctive relief, as authorized by applicable Colorado statutes, is essentially equitable in nature, even though in order to obtain complete relief an award of damages is also sought. Equitable injunction includes the power to provide complete relief in light of the statutory purpose. Mitchell v. De Mario Jewelry, 361 U.S. 288; Schine v. Schine, supra. Cf. Kirschner v. West Co., 3 Cir., 300 F.2d 133. Ephraim sought the stay not to permit the prior determination of a related equitable matter, such as a defense or a counterclaim, but rather for the purpose of deferring the action until the determination of an administrative proceeding, involving separate parties, pending before the Colorado Public Utilities Commission, a quasi-judicial, regulatory agency. Such an administrative proceeding is not to be equated with an historical equity action. Allied Air Freight, Inc. v. Pan American World Airways, Inc., 2 Cir., 340 F.2d 160, cert. denied 381 U.S. 924.

APPEAL DISMISSED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 369

EPHRAIM FREIGHTWAYS, INC., Petitioner

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court was an unreported interlocutory order, and has been set forth verbatim in the Appendix to the Petition. The opinion of the Circuit Court, which is reported at 376 F.2d 40, has also been reproduced in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites have been adequately set forth in the Petition.

QUESTION PRESENTED

Whether in this action in the District Court, in which the complaint seeks equitable relief, an admittedly interlocutory order, which denied a motion by the defendant to stay the action pending the outcome of an entirely separate controversy involving different parties before a state administrative agency, constitutes the refusal of an "injunction" by the District Court which may be appealed as such under the provisions of 28 U.S.C. § 1292 (a) (1).

STATUTE INVOLVED

The pertinent provisions of Section 1292 (a) (1), Title 28, United States Code, are contained in the Appendix to the Petition.

STATEMENT

This litigation had its inception in a complaint filed by the Respondent, as Plaintiff in the District Court, alleging that the Defendant, which is the Petitioner here, is engaged in certain activities contrary to the Colorado laws governing operations by common and private (contract) carriers by motor vehicle. An injunction is sought against the complained of activities, together with related damages for such activities in the past (R. 1-11). Jurisdiction was founded and exisits on the basis of diversity of citizenship between the parties and the requisite value of the matter in controversy (R. 1, 77, 86). The parties will be referred to by the positions they occupy here.

The action in the District Court was commenced on August 11, 1965 (R. 1). Thereafter, the Petitioner filed a series of motions attacking jurisdiction and the sufficiency of the complaint and to postpone discovery proceedings (R. 16-20, 30, 32). Ultimately, after extensive briefs and hearings, those motions were denied (R. 36, 39). The Petitioner then filed its answer to the complaint on January 17, 1966 (R. 43). After a pre-trial conference on March 4, 1967 (R. 71), the Petitioner amended its answer to incorporate certain additional defenses (R. 69). It should be noted that neither the original answer, nor the amended answer filed

March 11, 1967, raised any defense or interposed any objection to proceeding with the action because of the then pending proceeding before the Colorado Public Utilities Commission in the so-called *Miller* case[1/] which was later, on the eve of trial, to be invoked as a reason for indefinitely staying the action. However, as the record shows, the *Miller* case had been pending before the state commission since January 5, 1966 (R. 74D), and the Petitioner had served its motion to intervene in that administrative proceeding on March 10, 1966 (R.74R). Despite its obvious awareness of that proceeding before the state commission, the Petitioner did not advance the pendency thereof as a basis for staying the action in the District Court until its "motion to stay" which was eventually filed on April 29, 1966 (R. 74A). That motion was denied by an order of the District Court on July 20, 1966 (R. 83), which became the point of departure for the Petitioner's appeal to the Circuit Court (R. 99).

In denying the motion to stay the District Court was of the opinion that the situation did not warrant abstention from exercising its admitted jurisdiction in the case before it (R. 83-84). The Circuit Court did not reach that question, since it held that under the circumstances of the case the clearly interlocutory ruling of the District Court was not appealable as the equivalent of an order "refusing an injunction" within the meaning of 28 U.S.C. § 1292 (a) (1), which the Petitioner itself concedes to be the only possible jurisdictional basis for the appeal. The basis of the holding by the Circuit Court was an application of the established rule, enunciated in a series of cited opinions of this Court, that an interlocutory order of a district court granting or refusing a stay of a pending action is not appealable under the governing statute unless, first, the action against which the stay would operate is essentially a legal rather than an equitable proceeding, and, secondly, the stay was sought to permit the prior determination of a related equitable matter

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1/ *Denver Laramie Walden Truck Line, Inc. et al* v. *Miller Brothers, Inc.*; Case No. 5314, Colorado Public Utilities Commission (R. 74D).

(376 F.2d at 41). The Circuit Court found that neither of the conditions to the limited appealability of such orders was met in the present case, and accordingly dismissed the appeal. The Petitioner now seeks a writ of certiorari to review the action of the Circuit Court. The Respondent opposes the issuance of the writ on the grounds that this is not an appropriate case for the exercise of certiorari jurisdiction by the Court, and that, in any event, the decision of the Circuit Court is manifestly correct and in harmony with the prior opinions of this Court and the decisions in other circuits.

ARGUMENT

There is nothing about the present case to occasion review by this Court on certiorari. The only question raised by the Petitioner concerns the routine application by the Circuit Court of established principles limiting its own appellate jurisdiction over a purely interlocutory order by the District Court. In such a case, it has been said before that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).[2/] No reason for departing from that policy suggests itself here. From the Petitioner's side, the worst that can be claimed is that it will probably otherwise face an earlier trial in the District Court on the merits of a suit admittedly within the jurisdiction of that court. There is no showing as to how any extraordinary inconvenience or embarrassment, other than perhaps the potential hazzards of litigation to any defendant, could be even temporarily spared by undertaking review of the case at this time.

Moreover, the petition presents no important or pressing federal question, entails no constitutional problem, ex-

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2/ See, also, *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-5 (1952); *Cobbledick* v. *United States*, 309 U.S. 323, 324-5 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

poses no conflict in decisions, nor raises any other circumstance which might call for the exercise of this Court's jurisdiction over the matter. The arguments made for granting the writ plough fields already well marked. Indeed, the Petitioner itself concedes, at page 5 of the Petition, that "the court below had an apparently reasonable basis for ruling as it did" in terms of what the Petitioner styles as the "language" of certain prior opinions by this Court. To the same effect, confronted with unanimity among the decisions of the circuit courts in dealing with the jurisdictional question involved, at page 7 of its Petition the Petitioner is relegated to the notion that the purpose of 28 U.S.C. § 1292 (a) (1), at least as the Petitioner sees it, "is being frustrated by the courts of appeal". However novel the Petitioner's approach may be, it falls at the threshold in failing to comprehend the holdings of the decisions it attempts to distinguish and disparage.

Structurally, the Petitioner erects its entire argument upon the quotation of an incomplete sentence from the opinion in *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation,* 293 U.S. 449 (1934), coupled with a fragmentary excerpt from a dissenting viewpoint in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955). The selective references to those decisions misses their meaning.

The *Shanferoke* case, upon which the Petitioner places its chief reliance, necessarily derives much of its meaning from another case which was decided the same day, *Enelow* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935), which is the source of the doctrine followed and applied as controlling in *Shanferoke.* The *Enelow* case involved an action at law to recover upon a policy of life insurance, in response to which the defendant insuror set up certain equitable defenses. The defendant then moved that the "equitable issue" raised by its defense be determined by the court, functioning as a chancellor in equity, in advance of a jury trial on the action at law initiated by the complaint. This, of course, was tantamount to a motion to stay the action at

law. The District Court granted the motion, and was affirmed by the Circuit Court on appeal. On certiorari, this Court upheld the appealability of the order granting the stay under the provisions of former Section 129 of the Judicial Code, which now appear essentially intact in Section 1292 (a) (1) of the Code, stating as follows:

> "This section contemplates interlocutory orders or decress which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Sec. 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity'" (293 U.S. at 381-2).

The foregoing reasoning also clearly dictated the result which was reached the same day by the brief opinion in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., supra,* on which the Petitioner bottoms its argument here. In that case the Court was dealing with an action at law to enforce a contract for the sale of coal, in connection with which the defendant interposed a motion to stay the action on the basis that the contract required prior resort to arbitration. Holding that under the circumstances

the order of the District Court denying the stay was appealable under the forerunner of the statutory provision presently in question, this Court applied the doctrine of *Enelow*. In that connection, the Petitioner clearly misses or disregards the basis of the holding in *Shanferoke,* and patently distorts the meaning of that case by citing it for the blunt proposition, quoted out of context at page 5 of the Petition, that a "motion for a stay is an application for an interlocutory injunction". No such simple proposition was laid down in that case. What the Court actually said there appears very clearly when the isolated and incomplete statement relied upon by the Petitioner is placed back in context, as follows:

> "For the reasons stated in *Enelow* v. *New York Life Ins. Co.,* decided this day, *ante,* p. 379, an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Sec. 274b, is appealable under Sec. 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Sec. 274b; and that a motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U.S. at 452).

Thus, it is readily seen that the true holding of the *Shanferoke* and *Enelow* cases, which the Petitioner grossly misinterprets and misapplies, lays down only a very narrow exception to the general rule precluding appeals from interlocutory orders granting or denying stays of proceedings. That exception operates only when, in theory, a court of equity has in effect restrained or refused to restrain proceedings in a pending action or law, or, in the words used by the Court in *Enelow,* when the trial court "in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose" (293 U.S. at 383).

Subsequent decisions by this Court dealing with the

same point have uniformly applied and reinforced the same rule. Thus, while the rationale of *Enelow* and *Shanferoke* was deeply rooted in historical distinctions between common law and equity practice, the doctrine formulated in those decisions survived the abolition of formalism between legal and equitable proceedings under the Federal Rules of Civil Procedure. This is made clear in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942), where the Court, following *Enelow*, again restricted the appealability of interlocutory orders granting or refusing a stay of proceedings to a situation in which an action which formerly would have been cognizable at law was stayed in order to allow a related equitable matter to be determined first. There, a stay which operated against an action at law to provide for the prior determination of an equitable counterclaim was held by the Court to be "as effective in these respects as an injunction issued by a chancellor," and for purposes of appealing that order the appellants were viewed as being "in no different position than if a state equity court had restrained them from proceeding in the law action" (317 U.S. at 192).

The *Enelow, Shanferoke,* and *Ettelson* cases all upheld the appealability, under the interlocutory injunction rationale, of orders dealing with stays of actions at law which were sought to permit the prior determination of a related equitable matter, such as a defense or counterclaim. The converse of the situation was presented for the first time in *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U.S. 254 (1949). There, the question concerned the appealability of an interlocutory order governing the manner of proceeding with a trial in an action in which equitable relief was sought by the plaintff and where the defendant interposed a legal counterclaim. While the precise question in *Morgantown* concerned an order of the District Court denying the defendant's demand for a jury trial, in holding that order to be non-appealable, this Court deemed it necessary to distinguish and explain its prior holdings in the *Enelow* and *Ettelson* cases. It did so on the basis that the circumstances before it, unlike those in the

prior cases, did not present "a situation where a 'chancellor' in denying the demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending action at law" (337 U.S. at 257). Further explication of that distinction was set forth in the concurring opinion of Mr. Justice Frankfurter, who viewed the difference between actions at law and suits in equity as decisive to the appealability of interlocutory stay orders. After pointing out that both of the prior decisions in *Enelow* and *Ettelson* had involved stays of actions at law in order to allow for a prior equitable determination of a related claim or defense, and were thus tantamount to and appealable as interlocutory injunctions under the forerunner of 28 U.S.C. Sec. 1292 (a) (1), Justice Frankfurter emphasized the difference in *Morgantown* as follows:

> "A layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable. The *Enelow* and *Ettelson* cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves *Enelow* and *Ettelson* untouched."

The final and presently definitive exposition of the doctrine controlling the present case occurred in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955). Involved there was an action seeking equitable relief, where the defendant moved for a stay pending arbitration under the contract upon which the action was founded. The motion to stay was denied, and the Court of Appeals for the Sec-

ond Circuit, relying upon *City of Morgantown* v. *Royal Insurance Co., supra,* dismissed the appeal from that interlocutory order. Of special pertinence here, in affirming the denial of the appeal in the *Bodinger* case this Court took special pains to point out the basic distinction, which governs here, between orders staying or refusing to stay actions at law to permit a related equitable proceeding to go first, which are appealable under the statute as orders granting or refusing injunctions, on the one hand, and, on the other hand, other types of interlocutory orders concerning stays of proceedings which are not appealable either because the suit sought to be stayed is itself equitable, or because the stay is not sought to allow the prior determination of what is an equitable matter. Clearly explaining the difference in treatment of such orders for the purposes of interlocutory appeal, the opinion of this Court in *Bodinger* states:

> "The *Morgantown* case controls here. Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the *Enelow* and the *Ettelson* cases as a stay through equitable principles of a common-law action. This present case is to be distinguished from the *Shanferoke* case, *supra,* note 5, in the same way. There in a common-law action a motion for an interlocutory injunction on an equitable defense was refused.

The distinction has apparently escaped the Petitioner, which is now pursuing an application for certiorari on the notion, expressed at page 5 of the Petition, that the present case presents an excellent opportunity to announce, "once and for all", the "distinction" between cases such as *Shanferoke* and *Morgantown,* and to "reconcile them" with the governing statute. In light of what has been said most recently in the *Bodinger* case, however, particularly in the

portion of the opinion in that case which has been quoted immediately above, the Petition for review in the present case appears to seek an exercise in tautology.

The doctrine which evolved through the series of five decisions of this Court which have been discussed above is today firmly cemented in the law. As the Petitioner recognizes, the Circuit Courts have uniformly followed that doctrine in a host of cases confining the appealability of stay orders to situations where an action at law has been stayed or sought to be stayed to allow a prior and related equitable determination. A by no means exhaustive survey would disclose prior decisions to that effect in the Second, Third, Fourth, Fifth, Sixth, Ninth and District of Columbia Circuits. See, e.g., *Wilson Brothers* v. *Textile Workers of America* (2nd Cir. 1955), 224 F.2d 176, cert. den. 350 U.S. 834; *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.* (2nd Cir. 1965). 340 F.2d 160, cert. den. 381 U.S. 924; *Schine* v. *Schine* (2nd Cir. 1966), 367 F.2d 685; *United States* v. *Horns* (3rd Cir. 1945), 147 F.2d 157; *Kirschner* v. *West Company* (3rd Cir. 1962), 300 F.2d 133; *International Nickel Co.* v. *Martin J. Barry, Inc.* (4th Cir. 1953), 204 F.2d 583; *Jackson Brewing Co.* v. *Clarke* (5th Cir. 1962), 303 F.2d 844, cert. den. 371 U.S. 891; *Dowling Brothers Distilling Co.* v. *United States* (6th Cir. 1946), 153 F.2d 353; and *Travel Consultants, Inc.* v. *Travel Management Corp.* (D.C. Cir. 1966), 367 F.2d 334.

The decision of the Circuit Court in the present proceeding was clearly justified and dictated by the definitive prior opinions of this Court, and is squarely in line with a substantial body of precedent in the other circuits. Simply stated, the appeal in the present case failed to meet either of the conditions for appealability of stay orders which have become firmly engrafted upon 28 U.S.C. § 1292 (a) (1). In the first place, the action in this matter before the District Court is one in which injunctive relief is being sought by the complaint, and is therefore clearly equitable in nature, even though an award of damages for past activities is also sought in order to obtain complete relief. *Mitch-*

ell v. *DeMario Jewelry,* 361 U.S. 288 (1960); *Schine* v. *Schine, supra.* The Petitioner disputes this, apparently on the theory that the magnitude of the damages sought in itself classifies the case as an action at law. No authority is cited for that proposition, however, and it is doubtful that any such exists. In that regard, it is notable that for other purposes the Petitioner prefers to concentrate on the dominant equitable character of the suit, as for example in attempting to shore up the importance of the case by pointing out that the injunction which is sought "would virtually put defendant out of business". While that tends to exaggerate somewhat, no one reading the pleadings could seriously doubt the classical equity proportions of the case in terms of the injunction being sought. Accordingly, under the holding of *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955), an interlocutory appeal from the order denying the stay of the proceeding does not lie.

Secondly, even if the action in the District Court could be regarded as essentially legal in nature, the appeal was also without jurisdictional footing because the stay was not sought to permit the prior determination of any related equitable matter. Instead, the sole and only purpose of the stay which was sought was to postpone the action indefinitely until a determination by the Colorado Public Utilities Commission of the *Miller* case, which is an entirely separate proceeding between different antagonists. Clearly, the separate administrative proceeding pending before the Colorado Commission is in no sense the equivalent of an equity suit or matter having relation to the present action. In an analogous situation, following the doctrine of limited appealability of interlocutory stay orders discussed above, the Court of Appeals for the Second Circuit refused to entertain an appeal from a District Court order staying an anti-trust suit pending further related proceedings before the Civil Aeronautics Board, stating:

> "Under Section 1292 (a) (1) an order staying proceedings, to be appealable, must have stayed a legal action to allow prior trial of an equitable defense

> or counterclaim . . . But the weight of authority has refused to equate administrative proceedings which have been allowed priority with historical equity action." *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.* (2nd Cir. 1965), 340 F.2d 160, cert. den. 381 U.S. 924.

The order denying the stay in the present action is even a step further removed from appealability. Here, the difficulty is not only that the *Miller* case cannot be equated with historical equity proceedings, but it lacks any real nexus with the litigation in the District Court. While the two proceedings may superficially share some common issues, they are by no means interdependent. The Respondent is not a party in *Miller,* and while the Petitioner is perhaps nominally so, solely as a result of venturing to intervene in that proceeding, no claim is asserted in that controversy either by or against the Petitioner. Accordingly, to state, as the Petitioner does, that it will be "bound" by the decision in *Miller* is a rather deceptive use of the term. Certainly, nothing which has been undertaken nor which can be decided by the Public Utilities Commission in the *Miller* case will conclusively adjudicate the legality of the Petitioner's activities which have been challenged in the present action, nor can any possible outcome of the *Miller* proceeding obviate a trial in the present case or, for that matter, predetermine any of the issues in this case. The Colorado Public Utilities Commission is not a court of any sort, and is altogether impotent to render authorative declarations of the law. *Pirie* v. *Public Utilities Commission,* 72 Colo. 65, 209 P. 640; *Public Utilities Commission* v. *Manley,* 99 Colo. 153, 60 P.2d 913, 919. Consequently, even if the proceeding before the Colorado Public Utilities Commission were exalted to a status equivalent to an equity proceeding, and even if the present case were to be regarded as involving merely an action of law, the lack of any essential interrelationship between the proceedings nullifies any possible analogy to cases such as *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., supra,* in which stay orders, which involved the assertion of equitable jurisdic-

tion to control and perhaps ultimately defeat an action at law, were regarded as having the substantial effect of an injunction. No such comparison is possible here.[3/]

The various contentions by the Petitioner concerning the legal controversies between common and contract carriers in Colorado, and what the Petitioner has to say about the supposed perils and problems of proceeding with a trial and adjudication in the present[4/] case in advance of the final outcome of the *Miller* case, are completely wide of the mark and amount to little more than flights of fancy contrived to support the unsupportable proposition that the narrow and rather simple issue now before this Court is one of great public importance. These are matters which were all thoroughly thrashed out before the District Court and found to be without merit, and which although vigorously argued on appeal the Circuit Court properly refused

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3/ The total independence of this case and the proceedings before the Colorado Public Utilities Commission also obviates the concern reflected by Mr. Justice Black in his dissent in *Baltimore Contractors, Inc. v. Bodinger, supra,* cited by the petitioner for the proposition that "two trials, one unnecessary, may take longer and cost more than two appeals where one would do" (348 U.S. at 186). Unlike the situation in *Bodinger,* where it could be argued that entertaining the interlocutory appeal might have led to referring the case to arbitration, and therefore rendering a trial unnecessary, a review of the refusal of the stay in the present action could not, even if that refusal were reversed, lead to a binding adjudication of the present controversy by any means other than an ultimate trial and judgment in the District Court.

4/ The attempts of the petitioner to convey the impression that the Colorado Public Utilities Commission is the preferred forum for deciding this type of controversy, or that the Commission has some peculiar expertise in such cases, are not well taken. To the contrary, the Commission has no primary jurisdiction in the matter and the governing statutes expressly provide for direct actions and remedies in any court of competent jurisdiction. *Don Ward, Inc. v. Miller,* 154 Colo. 370, 390 P.2d 812. The Federal Courts in Colorado have exercised such jurisdiction in the past. *Colorado Milk Transport, Inc. v. Safeway Stores, Inc.* (10 Cir, 1959), 269 F.2d 755. The Colorado substantive law to be followed by the District Court in this action, as well as by the Commission in the *Miller* case, is already well charted. See, e.g., *McKay v. Public Utilities Commission,* 104 Colo. 402, 91 P.2d 965. The statute recently passed by the Colorado Legislature, which is printed in the appendix to the petition is totally irrelevant to the case at bar, since its only possible effect deals with the issuance of new authorizations to common carriers, not with the liability for unauthorized common carrier operations in issue here.

to reach. The short answer is that they have nothing to do with the question which is presented here, which is simply whether a long-standing and often applied rule limiting the appellate jurisdiction of Circuit Courts over interlocutory appeals justifies further review and restatement by the Court at this time. The Petitioner has utterly failed to supply adequate reasons for doing so, and none is believed to exist.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 369

EPHRAIM FREIGHTWAYS, INC., Petitioner,

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner submits the within brief in reply to matters raised by respondent in its brief in opposition.

ARGUMENT

Plaintiff states at the outset of its argument in its brief in opposition: "There is nothing about the present case to occasion review by this Court on certiorari." To the contrary, this defendant has shown that the matter before this Court is worthy of consideration of this Court for review.

Plaintiff has dismissed the final portions of the petition which demonstrate the importance of this entire matter on appeal as "little more than flights of fancy contrived to support the unsupportable proposition" of defendant. The importance of this entire matter — to defendant, since if plaintiff prevails, it would virtually force defendant out of business; to 90% of the contract carriage in Colorado, since it conducts its operations in substantially the same manner as defendant; and to the people of the State of Colorado, shippers and consumers alike — in our view has been adequately set forth in the petition on pages 8-10. Further, defendant has shown that this is a matter of importance to all others seeking appeals who will be indirectly affected by the order of the Court of Appeals which denied review of the order denying defendant's motion to stay proceedings in the district court.

Defendant in its petition relies upon *Shanferoke Coal & Supply Corporation v. Westchester Service Corporation,* 293 U. S. 449 (1934) to support its position that the order is appealable. Plaintiff has spent several pages explaining the meaning of *Shanferoke.* With plaintiff's conclusion regarding *Shanferoke* we wholeheartedly agree. *Shanferoke* permits an appeal where a court has "refused to restrain proceedings in a pending action [at] law, or, in the words used by the Court in *Enelow,* when the trial court 'in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose' (293 U. S. at 383)." Respondent brief p. 7. This is precisely what the District Court did in the within matter. It refused to restrain proceedings in the pending action at law when it refused to grant the stay requested by this defendant. Defendant therefore did not miss or disregard the basis of the holding in *Shanferoke,* nor patently distort the meaning of that case nor grossly misinterpret nor misapply the holding of those cases as plaintiff has charged on p. 7 of its brief.

There is no question about the fact that the district court below refused to stay the within action. The only question is, did the court refuse to restrain proceedings in a pending action *at law*. The first point of disagreement between plaintiff and defendant here is simply as to whether the pending action is an action at law or a suit in equity. To determine that matter requires only an examination of the complaint. This was done on page 6 of the petition wherein defendant demonstrated that the matter is an action at law. Plaintiff cannot change its action simply by announcing to this Court that it is otherwise. It is at least an action at law — and defendant submits that it is predominately an action at law — coupled with an action in equity, and therefore is appealable under the *Shanferoke* case. This principle has already been announced by this Court.

However, a principle which has never been announced by this Court is the principle which plaintiff seeks to apply in its argument on page 10 and thereafter. Its contention is that a stay order if it is to be appealable must be for the purpose of permitting a prior determination of a related *equitable* matter. Plaintiff cites and quotes from *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176 (1955) in support of this proposition. However the *Bodinger* case does not support plaintiff's proposition. This proposition has been set forth only in cases before various courts of appeal. Until now this doctrine had never been announced by the court below for the tenth circuit. The doctrine appears clearly in conflict with 28 U.S.C., section 1292 (a) (1) which says nothing to the effect that appealability requires that the purpose of the stay must be for the prior determination of a related equitable matter.

The stay sought by defendant herein was for the purpose of permitting the prior determination of a related matter pending before the Public Utilities Commission of the State of Colorado. Defendant has shown in its petition that the basic issues before the Commission are also the

basic issues in the within matter. The determination by the state tribunals will be controlling upon the federal courts. Therefore, defendant submits, that the matter before the Commission is a directly related matter, whether it is an equitable matter or not. This purpose, along with the other requirements of appealability which are here present, should be sufficient reason to permit an appeal, if any "purpose" at all is necessary under the statute. Defendant has petitioned this Court to determine the question which, it is believed, has never been determined by this Court, namely, whether under 28 U.S.C. section 1292 (a) (1) a stay order is appealable only if the stay was sought to permit the prior determination of a related *equitable* matter, and whether a purpose such as is here present is sufficient. This important question of appealability, it is submitted, should be passed upon by this Court.

Such a decision by this Court will be of further importance to appellants in other courts throughout the federal judicial system which have had no decision from this Court as to whether it is necessary in order that a case be appealable that a prior determination of a related equitable matter be the purpose of the stay sought.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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John H. Lewis
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August 1967